



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO 84 OF 2011

EAST AFRICA BREWERIES LTD.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER OF STATE FOR PROVINCIAL

ADMINISTRATION.....2ND RESPONDENT

**THE NATIONAL CAMPAIGN AGAINST DRUG
ABUSE AUTHORITY (NCACADA).....3RD RESPONDENT**

JUDGMENT

Introduction

1. The Petitioner, East Africa Breweries Ltd is a limited liability company registered under the provisions of the Companies Act (CAP 496) whose core business is the manufacture, distribution and sale of alcoholic drinks. In its petition dated 26th May 2011, it seeks a declaration that **Section 32** of the **Alcoholic Drinks Control Act, 2010** is unconstitutional, void and unenforceable to the extent of its unconstitutionality. It also seeks a permanent injunction to restrain the Respondents, by themselves or through their servants, agents, officers or employees from in any way purporting to enforce or give effect to the provisions of **Section 32** of the **Alcoholic Drinks Control Act, 2010**. It has also sought an order for costs.

Petitioner's Case

2. In carrying out its business of manufacturing, distributing and selling alcoholic drinks, and prior to the enactment of the **Alcoholic Drinks Control Act, 2010**, the Petitioner claims that with regard to packaging of its commodities, it was governed by the **Weights and Measures Act (Cap 513)**. That **Section 34** of that **Act** allows the Minister to make rules *inter alia* prescribing the manner in which any container may be marked. Accordingly, the Minister enacted the Sale and Labelling of Goods Rules, which provide for the labelling of alcoholic drinks. However, this rules did not specifically address the character, size and percentage of space to be taken by the label on any one alcoholic beverage container.

3. It is thus the Petitioner's position that having consistently obeyed and adhered to the provisions of the

Weights and Measures Act, it legitimately expected protection of the law as provided for by **Article 27** of the **Constitution**.

4. The Alcoholic Drinks Control Act was enacted in 2010 and in **Section 32** thereof a health warnings label must be displayed in such a manner as to cover not less than 30% of the total surface area of the package. The Petitioner is now aggrieved with this requirement which it claims has gone much too far because it is curbing the liberty of the Petitioner to carry out its trade in the manner it deems fit. The Petitioner thus referred the Court to the case of *Allgeyer v State of Louisiana 165 U.S. 578 (1897)*, where the US Supreme Court set limits on how the State may legitimately exercise its police power.

5. It is also the position of the Petitioner that Kenya is a member of the World Trade Organization (WTO) and the International Organization of Legal Metrology (IOLM) and also a signatory to the Agreement on Technical Barriers to Trade (TBT) Agreement. It thus claims that these treaties and agreements are binding on Kenya and they form part of the Kenya Law under **Article 2 (5) and (6)** of the **Constitution**.

6. The Petitioner therefore claims that the provisions of **Section 32** of the **Alcoholic Drinks and Control Act** are inconsistent with the principles enunciated in the TBT Agreement regarding the preparation, adoption and application of technical preparations to the extent that the TBT Agreement has cautioned member states from maintaining technical regulation that would restrict trade. And also that the technical regulations should be based on product requirement in terms of performance rather than design or descriptive characteristics. It is therefore the Petitioner's further contention that the implementation of the labelling contemplated by **Section 32** of **Alcoholic Drinks and Control Act** would be against internationally accepted practice as prescribed by WTO and IOLM.

7. It is also its position that the implementation of the labelling contemplated under **Section 32** of the **Alcoholic Drinks Control Act** would serve to significantly diminish the brand name, brand value and brand identity of the Petitioner's products, all of which constitute a significant part of its property and thus a violation of the Petitioner's right to property as enshrined under **Article 40** of the **Constitution**.

8. The Petitioner further claims that it is impossible to implement the labelling contemplated by **Section 32**, using the current machinery for large volume brands, because it would cost the Petitioner an estimated Ksh. 800 million to replace all the bottle labelling equipment as the present machinery valued at Ksh.600 Million does not have the necessary capacity to do so and it would be rendered obsolete.

9. The Petitioner also alleges that the action of compelling the manufacturers, distributors or sellers of alcoholic drinks to pass a certain message to customers would encroach on their freedom of expression as guaranteed under **Article 33** of the **Constitution**.

10. According to the Petitioner, **Article 24** of the **Constitution** imposes the proportionality test and when interfering with fundamental rights, government action must be reasonable and justifiable as stipulated by Article 24 thereof. It claims that even if there is rampant abuse of alcohol in Kenya, there is no scientific research to support the 30% rule. It submitted that the adoption of the practice in Thailand as argued by the Respondents would not amount to good practice, and argued that labeling a third of the printed area would not be justifiable and reasonable. The orders that it seeks are reproduced elsewhere above.

1st and 2nd Respondent's case

11. The 1st and 2nd Respondent filed grounds of opposition dated 12th August 2011. It is their contention that this petition does not disclose any constitutional issue for determination. They claim that the question as to whether a certain provision in an Act of Parliament is at variance with certain regulations or provisions in another Act of Parliament would not *per se* amount to a constitutional issue.

12. With regard to right to property, the 1st and 2nd Respondents contend that diminishing anticipated profits of the Petitioner does not amount to property as defined by **Article 260** of the **Constitution**.

13. It also their position that **Article 2 (5) and 2 (6) of the Constitution**, does not elevate general rules of international law or provisions of any treaty ratified by Kenya to the status of constitutional provisions but they form part of the laws of Kenya just like customary law would. In addition, they claim that since Parliament has not domesticated the provisions of WTO and TBT Agreements, they do not have the effect of law in Kenya.

14. It was also their position that the intention of enacting the impugned section are for the larger public good as opposed to the interests of the Petitioner which are purely commercial. They claim that there is a need to protect the consumer by ensuring that he could see the health warning label with prominence.

3rd Respondent's case

15. The 3rd Respondent, NACADA, claims that the Alcoholic Drinks Control Act fundamentally deals with matters of protection of health, promotion of research, information and education to the public, and formulation of measures to curb and/or reduce the abuse or illicit manufacture, trade and consumption of alcoholic products. It thus alleges that this Act is constitutional as it has the overriding purpose of protecting the public, socially, health wise and economically. And that this Petition does not raise any constitutional questions within the known jurisdiction of this Court for interpretation.

16. The 3rd Respondent further contends that the Petitioner has brought this suit to advance its own commercial interests which do not override the interests of the larger public. And it alleges that under **Article 46(1) of the Constitution**, the consumers of the Petitioner's products are enabled with a constitutional right to access products that protect their health, safety and economic interests. It is thus its position that, section 32 does not infringe on any rights of the Petitioner but protects the rights of the consumers who are the Petitioner's eventual customers. In any event, the 3rd Respondent claims that **Section 32** does not in any way infringe the provisions of **Articles 24, 27, 40, 47 and 49 of the Constitution**.

17. With regard to the provisions of the **Weights and Measures Act**, the 3rd Respondents submits that the provisions of **Section 32 of the Alcoholic Drinks and Control Act** are intended to supplement the set out standards under the **Weight and Measures Act** and does not in any way contradict it.

18. It claims that clear and legible health warning messages on an alcoholic bottle has been proven to psychologically impact positively on the society and in the long term assist in curbing abuse of alcohol. It referred the Court to the Report of the Alcohol and Public Health Research Unit of the Australia and New Zealand Food Authority Inquiry, which found *inter alia* that;

(a) product health warning labels are a mechanism which reaches the appropriate 'target groups' who are the groups with an elevated risk of harm as those who consume alcohol open the most containers.

(b) Label messages can focus on practical, plausible and preventable actions and has been shown to influence behaviours of consumers.

(c) Labelling is a low cost intervention as once enacted, need only involve costs to the government in administration and enforcement and the costs to industry are low in that these are only costs in the initial design and the label becomes part of the normal packaging production costs.

(d) Labelling is based on the consumers' 'right to know' and is a policy which draws high public support as it offers consumers brief but accurate information on which to base their choices about the use of alcohol.

(e) Labelling impacts at the societal level by help to give some problems associated with alcohol a higher profile that they originally had.

19. It was the 3rd Respondent's position therefore that the provisions requiring manufacturers of

alcoholic products to label 30% of their products with a warning health message is not the first of its kind. For instance, Thailand introduced the legislation that required alcohol manufacturers to label their products so as to reduce the rampant alcohol abuse by members of its public. Subsequently, Thailand increased the percentile coverage area of the warning label on an alcoholic bottle from 30% to 40%. The 3rd Respondent's thus contends that the 30% stipulated by **Section 32** of the **Alcoholic Drinks and Control Act** is moderate.

20. The 3rd Respondent further argues that the Petitioner has not demonstrated its inability to replace the entire bottle labelling machine given that it had earlier on in April 2011 unveiled a new bottle for their Tusker brand that cost an estimated Ksh. 1 billion, yet the Act came into force in November 2011 and the 3rd Respondent thus claims that the issue of costs as raised by the Petitioner is unfounded and is merely a convenience and commercial concern and does not meet any legal threshold for laying a basis for and warrant a competent challenge to a statute on constitutional grounds.

21. The 3rd Respondent lastly submitted that the doctrine of laches has defeated the Petitioner's claim because 'equity aids the vigilant and not those who slumber on their rights'. It claims that the Petitioner was to adhere and implement the provisions set out under **Section 32** of the **Act** within 6 months. It thus submitted that having failed to do so, the Petitioner cannot raise a dispute at the last minute in order to subvert the law.

Determination

22. From the facts and submissions before me, there is no material dispute between the Petitioner and the Respondents on the facts giving rise to this Petition. This being a constitutional petition, I am called upon to determine if any rights of the Petitioner have been violated as a result of the enactment of section 32 of the Alcoholic Drinks Control Act. However, before addressing my mind to any violation of the Petitioner's rights as alleged above, I will first deal with the issue raised by the 1st and 2nd Respondents that this Petition does not disclose any constitutional issue for determination.

23. The Respondents claim that the question as to whether a certain provision in an Act of Parliament is at variance with certain regulations or provisions in another Act of Parliament would not *per se* amount to a constitutional issue. In response, the Petitioner argues that the provisions of the Constitution, specifically Articles 22 and 23 give this Court jurisdiction to hear and determine this matter.

24. I am in agreement with the submissions by the Petitioners. Article 23 of the Constitution allows this Court in an application brought under Article 22 of the Constitution to hear and determine applications for redress for a violation or infringement of a right or fundamental freedom in the Bill of Rights. In addition, Article 165 3(d) grants this Court jurisdiction to determine any question whether any law is inconsistent with or in contravention of the Constitution.

25. Having found that this Petition is properly before the Court, I now turn to examine the alleged constitutional violations raised in the Petition. It is now well established that a party alleging violation of a constitutional right must demonstrate, with a reasonable degree of precision, what provisions of the Constitution have been violated, as well as the manner in which they have been violated. See **Anarita Karimi Njeru v Republic (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance v Attorney General and Others, Petition No. 229 of 2012**. This is important not just to allow the Respondents to know the case that they have to answer, but important to enable the Court make a clear determination on the alleged violations.

26. The Petitioner is aggrieved by the provisions of **Section 32** of the **Alcoholic Drinks Control Act**, which requires that health warnings be displayed in such manner as to cover not less than 30% of the total surface area of the package. It asserts that this requirement for health-warning label goes much too far as it curbs the liberty of the Petitioner to carry out its trade in the manner that it deems fit. It is also its contention that this section has violated its right to property as provided for by **Article 40** of the **Constitution** and also limited their freedom of expression as provided for by **Article 33** of the **Constitution**.

27. The Respondents take the position that the impugned section was enacted for the larger public good as opposed to the narrow commercial interests of the Petitioner. They claim that there is a need to protect the consumer by ensuring that he could see the health warning with prominence. They are therefore calling upon this Court to balance between the interests of the Petitioner and those of the public.

28. I will first dispell the argument by the 3rd Respondent that the Petitioner is concerned with diminishing profits which does not constitute property. I understand the Petitioner to be aggrieved with Section 32 since it has interfered with the get up of the alcoholic drinks manufactured by the Petitioner and its trademark as well. The Petitioner is thus alleging a violation of its intellectual property contrary to **Article 40** of the **Constitution**.

29. The Constitution at Article 40 protects property rights. It provides as follows;

'40 (1) Subject to Article 65, every person has the right either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.'

Sub Article two of this Article prohibits Parliament from enacting a law that permits the State or any other person to arbitrarily deprive a person property of any description. It reads;

'Parliament shall not enact a law that permits the state or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any grounds specified or contemplated in Article 27(4).'

30. The Petitioner's chief complaint in this Petition is that the implementation of the labelling contemplated by Section 32 of the Alcoholic Drinks and Control Act is unconstitutional as it serves to significantly diminish the brand name, brand value and brand identity all of which constitute a significant part of it's intellectual property which amounts to a violation of the Petitioner's right to property as enshrined under Article 40 of the Constitution.

31. Section 32 of the said Act, states that;

(1) Subject to this section, no person shall

(a) Manufacture

(b) Import

(c) Sell or distribute

An alcoholic drink, unless the package containing the alcoholic drink conforms to the requirements of subsection 2.

(2) Every package containing an alcoholic drink shall-

(a) bear a statement as to its constituents; and

(b) have at least two of the health warning messages prescribed in the Second Schedule, in English or Kiswahili.

(3) The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the package.

(4) All the warning labels specified in the Second Schedule shall be randomly displayed in each twelve-month period on a rotational basis and in as equal a number of times as is possible, on every successive fifty packages of each brand of the alcoholic drink and shall be randomly distributed in all areas within the Republic of Kenya in which the alcoholic drink is marketed.

(5) The Minister may, by notice in the Gazette, prescribe that the warning, required under this section, be in the form of pictures or pictograms:

Provided that such notice shall come into operation upon expiration of six months from the date of its publication.

(6) The importer of an alcoholic drink which does not conform to the requirements of subsection (2) shall, at the point of importation, ensure that the imported alcoholic drink bears such sticker containing the warning messages specified under subsection (2) as may be prescribed.

(7) The requirements of this section shall not apply to an alcoholic drink which is manufactured in Kenya for export.

(8) A person who contravenes any of the provisions of this section commits an offence and shall be liable to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years, or to both.

(9) This section shall come into operation upon expiration of six months from the date of commencement of this Act.

32. I must now address my mind to the issue raised by the Petitioner. Is section 32 of Alcoholic Drinks and Control Act unconstitutional for violating the Petitioner's rights to property?

33. I am in agreement with the 3rd Respondents that the right to property as provided for by Article 40 of the Constitution is not absolute. It can be limited. It is not one of the rights not to be limited by Article 25 of the Constitution. I am also alive to the provisions of Article 46 which provides for consumer rights. The Constitution is not a one way street in which the rights of others and other provisions of the law are discarded. Pursuant to the provisions of Article 46 (1) (b) of the Constitution '**consumers have the right to the information necessary for them to gain full benefit from goods and services**'. I therefore opine that the health label as provided for by Section 32 of the Alcoholic Drinks Control Act is important as it enables the consumers to have information necessary for them to gain full awareness of the products produced by the Petitioner and the effect such products would have on them, particularly on their health. Indeed, Article 46 (1) (c) of the Constitution provides for the protection of the consumers health, safety and economic interests.

34. I recall that the Petitioner is claiming that to replace the bottle labelling equipment would cost it an estimated Ksh.800 Million which it does not have the capacity to raise at the moment. I am quick to remind the Petitioner that it cannot impugn a law to fit its circumstances but must adjust it's situation to be in accordance with the law. Indeed, the allegation that the Petitioner unveiled a new bottling plant for one of their beer brands at Ksh.1Billion is quite telling. The Petitioner knew very well that the **Alcoholic Drinks Control Act** had been enacted and would commence in November, 2011 and still went on to spend on a brand instead of planning on how to adhere to the new law and to my mind that is not the conduct of a bona fide litigant.

35. Having found out that the health warning label is important for the protection of the consumers rights and it is not in any way in violation of the Petitioner's rights to property, the question one would now ask is why 30% and not any other percentile? I am aware that the Petitioner is proposing to adopt the system in South Africa where the health label takes one eighth of the total surface area. On the other hand, the 3rd Respondent addressed me at length on the system in Thailand which has increased its legislation on

the health warning label total surface area from 30% to 40%. As a result, Thailand has been commended by the European Alcohol Policy Alliance on their new regulations on alcoholic health warning labels. The 3rd Respondent thus contends that the 30% stipulated by section 32 of the Alcoholic Drinks and Control Act is moderate.

36. To my mind, the question as to whether to adopt a 30% of the total surface area as proposed by section 32 of the Alcoholic Drinks and Control Act or 40% as it is in Thailand or the one eighth of the surface area as in South Africa is not a matter this Court can decide. Parliament is the body charged with the sole responsibility of enacting laws. When it did enact the provisions of the Alcoholic Drinks and Control Act, it had reasons for doing so. The Alcoholic Drinks Control Act came into force on 22nd November 2010. Its purposes is stated in the preamble as, '**An Act of Parliament to provide for the regulation of the production, sale and consumption of alcoholic drinks, to repeal the Chang'aa Prohibition Act, the Liquor Licensing Act and for connected purposes**'.

37. It seems to me that the impugned section intended as I perceive it and have stated elsewhere above to provide consumers with clear, legible and conspicuous information on the constitute of a particular alcoholic drink. The Petitioner in my view has not by that fact alone been coerced into expressing itself in violation of the freedom of expression as provided for by Article 33 of the Constitution.

38. Whether the information contained in the label has positive psychological impact on the society in assisting to curb abuse of alcohol in the long term or not is not a matter this Court can determine. Better put, whether, the 30%, 40% or an eighth of the surface area is sufficient or not is still not for this court to determine. In so holding I find support in the sentiments expressed in the case of **Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216**, where it was stated at paragraph 99 that;

'The primary duty of Courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where State Policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself'.

39. Clearly, I must balance the interests of the Petitioner and those of the consumers of the Petitioner's product. I have held above that the 30% total surface area coverage of the health warning label cannot be said to be unlawful and unconstitutional. Section 32 of the Alcoholic Drinks Act as reproduced elsewhere above was enacted by Parliament in its wisdom. And I find that neither this Court nor the Petitioner can direct Parliament on the kind of legislation to enact, unless it was enacted in total breach of the Constitution.

40. More so, this Court cannot direct what percentile to apply for the health warning label. The doctrine of separation of power as I understand it is a succinct doctrine in the architecture and design of our Constitution. I think it is at this point I should set straight the extent of the mandate of this Court in assessing whether an impugned section is in violation of the Constitution. The Supreme Court in **U.S v Butler, 297 U.S. 1[1936]**, stated in the dissenting judgment that;

'The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.'

In its majority opinion, the Court held that;

'When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.'

I wholly adopt the same reasoning and I will say no more.

Conclusion

41. It is obvious to me that the Petitioners, inspite of their spirited argument to the contrary have not made a case such as to entitle them to the orders sought in the petition. In the circumstances the Petition shall fail. Costs thereof shall be borne by the Petitioner. It is so ordered.

42. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – Court Clerk

Miss Orarro holding brief for Mr. Anoko for Petitioner's Mr. Bitta for 1st Respondent

Mr. Chege for 2nd Respondent

Order

Judgment duly delivered.

**ISAAC LENAOLA
JUDGE**

Copies of Judgment to be supplied to parties.

**ISAAC LENAOLA
JUDGE**